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OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

REC #33-0204/8

8 FEB 1979

MEMORANDUM FOR PATRICIA M. WALD
Assistant Attorney General
Office of Legislative Affairs

Re: Draft Intelligence Authorization Bill,
FY 1980

This is in response to your request for our views on the draft bill prepared by the CIA entitled the "Intelligence and Intelligence-Related Activities Authorization Act for Fiscal Year 1980." You specifically asked us to address legal issues relating to § 101(b) of the draft bill, which provides that the classified annex to be prepared by the Conference Committee "shall be deemed to reflect the intent of the Congress with respect to the authorization of appropriations for fiscal year 1980 for intelligence and intelligence-related activities" of the ten departments and agencies listed in § 101(a), including the FBI and DEA.

Unlike this draft bill, § 101(b) of the fiscal 1979 Intelligence Authorization Act provided that the classified annex shall be deemed to reflect the "final action" of the Congress with respect to the authorization of appropriations. The draft letter to the Speaker from Admiral Turner acknowledges this change in language and states that the proposal that the classified annex reflect the "intent of the Congress" is in keeping with the status generally accorded committee reports and that it is preferable to the "final action" language in the FY 1979 Act.

As an initial matter, we believe, and have stated heretofore, that Congress may incorporate a classified document into an Act of Congress by reference and thereby give the incorporated document the force and effect of law. */

There is no express requirement in the Constitution that a law be public, and it might be argued that the provision in Article I, § 5, cl. 3 of the Constitution for each House, in its judgment, to keep part of the journal of proceedings secret suggests that the entire legislative process, including the end product, may remain secret in some instances.

A principal purpose of legislation authorizing appropriations is to limit the amount of funds subsequently appropriated. If Congress appropriates money in excess of the amount authorized, the full amount of the appropriation is available for obligation. However, a bill appropriating funds in the absence of or in excess of authorizing legislation is subject to a point of order under the rules of the House and Senate. Accordingly, the point of order is a means for the committee having authorizing jurisdiction to limit appropriations. The statement in § 101(b) of the FY 1979 Authorization Act that the classified annex represents the "final action" of the Congress with respect to the authorization of appropriations for intelligence and intelligence-related activities may well reflect an effort to alter the established notion that an appropriation controls over a lesser authorization, thereby giving the Intelligence Committees greater control over the appropriations process.

The actual role of the Intelligence Committees in the authorizing process is not altogether clear, however. Other committees also have authorizing jurisdiction over the departments and agencies which have intelligence components falling within the Intelligence Committees' jurisdiction. In the case of the FBI, for example, the Judiciary Committees reported a bill in the last Congress (which was also referred to the Intelligence Committee on the House side) containing

*/ (Footnote from p. 1)

The Attorney General and this Office have advised the National Security Council that "incorporation by reference" is a legally permissible means whereby Congress may legislate with respect to sensitive national security matters.

a lump-sum authorization of appropriations for all FBI activities, including the foreign counterintelligence (FCI) and domestic security components that are subject to Intelligence Committee jurisdiction. If, in future years, the Appropriations Committees report bills appropriating a lump-sum for the FBI equal to the lump-sum amount in the Justice Authorization Act, but in an amount that appears to contemplate the availability of funds for FCI and domestic security in excess of the amount authorized to be appropriated under the Intelligence Authorization Act, it is unclear whether a point of order could successfully be raised that the appropriation exceeded the amount specifically authorized to be appropriated for those activities in the Intelligence Authorization Act. It may be that the Intelligence Committees would have to seek to insert more specific language in the Justice authorization and appropriation bills in order to obtain adequate leverage over the appropriations process. A classified annex to the Justice Appropriations Act could, for example, specifically provide for the appropriation of funds for FCI and domestic security within the limits established in the classified annex to the Intelligence Authorization Act. Similar problems are presumably raised with respect to the Defense authorization and appropriations bills.

Use of the phrase "final action" in § 101(b) could be viewed as an effort to give priority to the Intelligence Authorization Act and thereby resolve questions of overlapping and potentially conflicting committee jurisdictions. We have some doubt that it is useful to attempt to resolve issues of committee jurisdiction indirectly through a statement in an authorizing act. This is especially so with respect to the FBI, because the action of the last Congress in passing the Justice Authorization Act with specific adjustments for domestic security indicates that Congress did not view the classified annex as the Congress' final action on the subject.

The problems resulting from overlapping committee jurisdiction are obviously complex and potentially divisive, and it is not clear that the Executive Branch should step into the fray by suggesting alternative language to what was used last year. For example, the provision in the CIA

bill that the classified annex reflects only the "intent of the Congress," as opposed to the "final action of the Congress," could have the effect of necessarily relegating the Intelligence Committees to an advisory role. This would result, in our view, because § 101(a) does not authorize appropriation of specific amounts. Without incorporation of such amounts from the classified annex, the Intelligence Authorization Act would contain only an open-ended authorization. Statements of "intent" in the annex would appear to be without legal significance in limiting the amount authorized to be appropriated when the Act itself contains no such limitations. Thus, the language in § 101(b) of the CIA draft could be viewed as an effort to diminish the Intelligence Committees' formal role in the appropriations process, and perhaps have the effect of pitting these committees against the Judiciary and Armed Services Committees.

At the same time, we appreciate the concern that direct restrictions on intelligence agency activities or operations contained in a classified annex not be given the force of law. We doubt however, whether it is realistic to assume that this concern can be obviated by the inclusion of this language in the draft bill. The precise words used will surely be of considerable importance to the Intelligence Committees, and the change suggested here is certain to attract attention. We think that there is every possibility that the Intelligence Committees, in order to protect their jurisdiction and interests, would insert the "final action" language in the CIA draft, thereby raising anew the question whether the annex is binding on the Executive Branch.

One possible way of avoiding this result while meeting the intelligence agencies' concern and the potential concern of the Intelligence Committees identified above would be to divide the annex into two portions: a schedule of amounts authorized to be appropriated, and a classified statement dealing with agency expenditures and operations that would essentially be a committee report. The schedule could be incorporated by reference in the Intelligence Authorization Act and given the force of law. The narrative

and statement of intent could be treated merely as a classified appendix to the Statement of Managers and not even be mentioned in the Act. Accordingly, § 101(b) could be amended to read as follows:

(b) The amounts authorized to be appropriated under this act for the intelligence-related activities of the agencies listed in subsection (a) are those listed in the classified Schedule of Authorizations prepared by the Committee of Conference to accompany the Conference Report on H.R. of the 96th Congress. Copies of such annex shall be made available to the Committees on Appropriations of the House of Representatives and the Senate and to the appropriate elements of the United States Government for which funds are authorized under subsection (a).

Note that this language does not purport to accord the schedule "final" status. If this is thought necessary, an additional sentence could be added:

The amounts contained in the schedule shall be deemed to reflect the final [sole] authorization of appropriations for intelligence and intelligence-related activities of the agencies listed in subsection (a).

We have no way of knowing at this juncture whether this or some other approach will ultimately prove most satisfactory. Our central concern, however, is that the issue of the legal significance of any annex be fully debated early on in the legislative process. Obviously, if an annex is to have some significance greater than an ordinary committee report, the exact terms and limitations contained in that annex should be subjected to the same level of scrutiny that would be accorded the provisions of the bill itself.

Because of the complexity of the matter, and in light of the considerable range of apparent alternatives, we would propose that the issue of the Executive Branch's approach to the larger questions of the authorization and appropriation

process for the intelligence community should be the subject of at least preliminary discussions between this Department and the representatives of the intelligence community in advance of the submission of this bill. We would be pleased to meet to discuss this.

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